

MODIFICATIONS TO THE PUBLIC DRAFT AND RESPONSE TO COMMENTS

for the

**CALIFORNIA DEPARTMENT OF WATER RESOURCES
ON-GOING CALIFORNIA STATE WATER PROJECT OPERATIONS IN THE
SACRAMENTO-SAN JOAQUIN DELTA FOR THE PROTECTION OF LONGFIN
SMELT**



State of California
Department of Water Resources

February 2009

(STATE CLEARINGHOUSE NUMBER: 2009012022)

RESPONSE TO COMMENTS ON THE PUBLIC DRAFT INITIAL STUDY / DRAFT NEGATIVE DECLARATION FOR ON-GOING CALIFORNIA STATE WATER PROJECT OPERATIONS IN THE SACRAMENTO-SAN JOAQUIN DELTA FOR THE PROTECTION OF LONGFIN SMELT

DOCUMENT REVIEW AND AVAILABILITY

The public comment for the Public Draft Initial Study / Draft Negative Declaration for On-Going California State Water Project Operations in the Sacramento-San Joaquin Delta for the Protection of Longfin Smelt period extended from January 13, 2009 to February 2, 2009. The Initial Study/ Draft Negative Declaration was available for public review at the following locations:

- ☐ Sacramento Public Library, 828 I street, Sacramento, CA 95814
- ☐ Stockton-San Joaquin County Public Library – Cesar Chavez Central Library, 605 N. El Dorado Street, Stockton, CA 95202

In addition, the Initial Study/ Draft Negative Declaration was distributed to the parties listed in **Attachment 1**.

The Notice of Intent to Adopt the Initial Study/Negative Declaration dated January 13, 2009 stated that questions could be directed to:

Ms. Heidi Rooks
California Department of Water Resources
2500 Industrial Boulevard
West Sacramento, CA 95691
hrooks@water.ca.gov
phone: (916) 376-9704
fax: (916) 376-9688

Mailing Address:
PO Box 942836
Sacramento, CA 94236

COMMENTS RECEIVED

A total of three comment letters were received on the Initial Study/Draft Negative Declaration. The Natural Resources Defense Council submitted comments on February 2, 2009 via email. The State Water Contractors submitted comments on February 2, 2009 via email and facsimile. The California Department of Fish and Game submitted comments on February 2, 2009 via U.S. Mail. The comment letters are included as **Attachment 2, 3, and 4**. Responses to the Natural Resources Defense Council and State Water Contractor immediately follow the comment. The Department of Water

Resources is using the California Department of Fish and Games comments as supportive documentation for their response to comments.

SUPPLEMENTAL INFORMATION

The Department of Water Resources has provided supplemental information to support their responses to comments:

- ☐ **Attachment 5:** E-Mail from California Department of Fish and Game regarding shortened review
- ☐ **Attachment 6:** Department of Water Resources Request for Shortened Review
- ☐ **Attachment 7:** State Clearinghouse approval for Shortened Review
- ☐ **Attachment 8:** Copies of the Notice of Completion and Notice of Intent

Attachment 1

Last Name	First Name	Company
Armor	Charles	Department of Fish and Game, Bay-Delta Region
Binning	Bridgette	Department of Public Health, Drinking Water Section
Bobker	Gary	The Bay Institute
Brand	Marina	State Lands Commission
Chrisman	Mike	Resources Agency
Coordinator	CEQA	Water Quality Control Board, San Francisco Bay Region
Fiack	Linda	Delta Protection Commission
Flint	Scott	Department of Fish and Game Environmental Services Division
Floerke	Robert	Department of Fish and Game Bay-Delta Region
Freeman	Gary	County Clerk - San Joaquin County
Garcia	Fredrick	County Clerk - Sacramento County
Herrera	Steven	State Water Resources Control Board, Division of Water Rights
Jennings	Bill	California Sportfishing Protection Alliance
Keats	Adam	Center for Biological Diversity
Lomeli	Charles	County Clerk - Solano County
McAdam	Steve	San Francisco Bay Conservation & Development Committee
Morey	Sandy	Department of Fish and Game North Central Region
Nelson	Barry	Natural Resources Defense Council
Oakley	Freddie	County Clerk - Yolo County
Quinn	Timothy	Association of California Water Agencies
Roddy	Frank	State Water Resources Control Board, Division of Water Quality
Sotelo	Mike	Boating and Waterways

Last Name	First Name	Company
Stewardship Section	Environmental	Department of Parks and Recreation
Vaughn	Greg	Water Quality Control Board, Central Valley Region
Weir	Stephen L.	County Clerk - Contra Costa County
Yego	Jon	Central Valley Flood Protection Board
		Contra Costa Planning Department
		Sacramento County Planning Department
		Sacramento County Public Library
		San Joaquin County Planning Department
		Solano County Planning Department
		State Water Contractors
		Stockton Cesar Chavez Central Library
		Yolo County Planning Department

Attachment 2

Natural Resources Defense Council Comments



NATURAL RESOURCES DEFENSE COUNCIL

February 2, 2009

Ms. Heidi Rooks
California Department of Water Resources
3500 Industrial Boulevard
West Sacramento, CA 95691

Sent via email to hrooks@water.ca.gov

RE: Comments on DWR's Initial Study / Draft Negative Declaration for On-Going California State Water Project Operations in the Sacramento-San Joaquin Delta for the Protection of Longfin Smelt (State Clearinghouse No. 2009012022)

The Natural Resources Defense Council ("NRDC"), representing more than 250,000 members and activists in California, is writing to comment on the aforementioned document (hereafter the "Draft Longfin CEQA Document"). The information presented in this letter and exhibits hereto, including the information provided by the Department of Fish and Game ("DFG"), demonstrates that there is a fair argument that the proposed project, as currently described by DWR, would cause a significant environmental impact to longfin smelt. As such, consistent with the requirements of the California Environmental Quality Act ("CEQA", Pub. Res. Code §§ 21000 et seq.), the document must be revised (possibly as a mitigated negative declaration) to include analysis of operations that fully mitigate the SWP's impacts on longfin smelt, consistent with the requirements of the California Endangered Species Act. *See* Cal. Fish Game Code § 2081.

NRDC-1

In addition, we respectfully request that DWR extend the comment period on this draft document in order to allow time for public comments that are informed by, and consider the information to be provided in DWR's forthcoming, revised application to DFG for an incidental take permit, as explained more fully below.

NRDC-2

1. The Draft Longfin CEQA Document Inadequately Analyzes Impacts to Longfin Smelt or other fish species, and there is a Fair Argument that the Project as Proposed Would Cause Significant Impacts to Longfin Smelt

Contrary to the central assumption in the Draft Longfin CEQA Document, the existing restrictions required by the U.S. Fish and Wildlife Service's biological opinion for delta smelt would not adequately protect longfin smelt, and operational restrictions to protect longfin smelt are necessary to protect the species and to meet DWR's obligations under the California Endangered Species Act ("CESA", Cal. Fish & Game Code §§ 2050 *et seq.*), CEQA, and other law. On page 2-1, the Draft Longfin CEQA Document asserts that,

NRDC-3

"DWR is not proposing any additional actions for protection of longfin smelt beyond actions already in place for protection of delta smelt. DWR believes these

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actions are sufficiently robust and effective in protecting longfin smelt from the effects of SWP operations to authorize take.¹

NRDC-3
continued

However, the Department of Fish and Game, the agency statutorily and constitutionally charged with protection of longfin smelt and the implementation of CESA, recently concluded that existing operations, including implementation of the Reasonable and Prudent Alternatives in the delta smelt biological opinion, likely would not be sufficient to protect longfin smelt. This conclusion results from biological differences between the smelt species, including the timing of spawning activities, as well as the fact that the operational restrictions to protect longfin smelt in the Fish and Wildlife Service's Biological Opinion are triggered by certain environmental conditions that relate only to delta smelt. *See* Declaration of Perry Herrgesell, Department of Fish and Game, dated January 13, 2009, at 14, attached hereto as Exhibit A.

NRDC-4

NRDC concurs with DFG's conclusion as to this point, based on the information in Exhibit A. Because the triggers for operational restrictions in the delta smelt biological opinion have no biological relationship with longfin smelt abundance, geographic distribution, or other risk factors to that species, these operational restrictions fail to ensure that project operations adequately protect longfin smelt from entrainment and other impacts that take the species. This is significant because longfin smelt generally spawn earlier in the year than delta smelt, potentially in different geographic areas of the Delta, resulting in different entrainment and other impacts from the SWP on these two smelt species. As a result, longfin smelt could be entrained in significant numbers at the SWP, without triggering any restrictions as a result of the delta smelt biological opinion. Therefore, the draft Longfin CEQA document should be revised to make clear that existing operational measures are insufficient to protect longfin smelt and meet DWR's obligations under the law, and the document must include analysis of measures that would be effective in doing so.²

NRDC-5

Equally important, DWR's analysis fails to provide any meaningful analysis of how existing operations would protect longfin smelt from entrainment, and fails to estimate or quantify the level of take that would occur with implementation of the proposed project, despite clear instructions from DFG that this information was required. *See* letter from Charles Armor of DFG to Barbara McDonnell of DWR dated November 24, 2008 ("It is important that the take that would be authorized by the ITP be described in detail in the CEQA document prepared for this project.").

NRDC-6

Moreover, there are significant deficiencies with the analysis of salvage of longfin smelt in the SWP and CVP, relative abundance of longfin smelt, and the relationship between salvage and abundance. *See* Draft Longfin CEQA Document, Appendix 3, at 59-79. For instance, as noted in Exhibit A, salvage of longfin smelt is a tiny fraction of the numbers of adult and juvenile

NRDC-7

¹ In addition, DWR acknowledges that if additional protective actions are necessary and have potential environmental impacts, DWR will undertake additional environmental review as required by CEQA. *Id.* In light of CEQA's mandate to provide the public with accurate information about projects and their environmental impacts, this document will need to be revised.

² In addition, the document also fails to acknowledge that the proposed project provides *less* protection for longfin smelt than the existing protections. *See* Cal. Code Regs., tit. 14, § 749.3(a)(3). As a result, the statement on page 4-1, that compliance with the measures in the take authorization "will, in fact, give additional protective measures to endangered and threatened species," is inaccurate and should be revised.

smelt that are taken by the SWP. DFG estimates that more than 1.5M adults and juveniles, and millions more larvae, have been entrained by the CVP and SWP since 1993. *See* Exhibit A at 10-11. Similarly, the document should be revised to make clear that there is a clear relationship between delta outflow and longfin smelt abundance. *See* Exhibit A at 6-7.

NRDC-7
confirmed

Therefore, we request that the final document be revised to include more accurate assessments of historical take, more accurately describe the relationship between outflow/X2 and longfin smelt abundance, and estimate take under the proposed permit.

NRDC-8

2. Measures to Protect Longfin Smelt Must Be Enforceable, Reduce Take From Entrainment and Other Sources, and Fully Mitigate the SWP's Impacts on Longfin Smelt.

Given the low abundance of longfin smelt and the impacts of the SWP on longfin smelt abundance and distribution, there is little question that additional operational restrictions are necessary to protect longfin smelt and meet DWR's legal requirement to fully mitigate the impacts of the SWP and longfin smelt. DFG recently found that longfin smelt should be listed under CESA in part because of SWP operations, including changes in salinity as a result of water exports, that lead to entrainment of longfin smelt. *See* DFG, A Status Review Of the Longfin Smelt (*Spirinchus thaleichthys*) in California dated January 23, 2009, available online at <http://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=10263> and incorporated herein by this reference. As a result, DFG generally recommended measures to reduce entrainment of longfin smelt and to provide additional habitat, including increased average December to May delta outflow. This appears consistent with DWR's findings, *see* Appendix A at 2-3, notwithstanding DWR's conclusion that no additional measures are necessary to protect the species. Therefore, the final CEQA document should be revised to incorporate measures which fully mitigate the SWP's impacts on longfin smelt.

NRDC-9

3. The Draft Longfin CEQA Document Fails to Provide Adequate Information About the Incidental Take Permit, thus Failing to Achieve CEQA's Public Information Mandate

One of the primary purposes of CEQA is to provide the public with information about proposed projects, their environmental impacts, and ways to mitigate those impacts to less than significant levels. Although the document references the permit application in several places, *see, e.g.*, Appendix 3 at 1-2, the Draft Longfin CEQA Document provides almost no meaningful information about the terms and conditions of the proposed permit. The permit application should be incorporated into the CEQA document, so that the public has the necessary information about permit terms, the anticipated level of take, and other relevant information to fully understanding and make informed comments on this CEQA document.

NRDC-10

For instance, only after we obtained a copy of DWR's initial permit application as a result of a Public Records Act request were we able to discover that DWR had applied for a permit with a thirty year duration. *See* California Incidental Take Permit Application for the California State Water Project Operations and Facilities, submitted to DFG in November 2008. The duration of the permit is critical information that should be included in the CEQA document because it: (1) establishes the time period for which the CEQA document should analyze impacts as a result of

NRDC-11

issuing this permit; and (2) requires an effective adaptive management program to ensure that new scientific information and/or continuing declines in abundance are effectively addressed.

NRDC-11
continued

Therefore, the Draft Longfin CEQA Document should be revised to include and incorporate the incidental take permit application in order to achieve CEQA's mandate.

NRDC-12

4. DFG, not DWR, Should be the Lead Agency for the Draft Longfin CEQA Document

Pursuant to CEQA, the CEQA Guidelines, and DFG's regulations, we believe that DFG, rather than DWR, should be the lead agency for purposes of CEQA. See Public Resources Code §§ 21065, 21067; Cal. Code Regs., tit. 14, § 783.3(b); CEQA Guidelines §§ 15050-15053. Because the only approval at issue is DFG's issuance of a permit to DWR, DFG should be the lead agency for this document. See also Draft Longfin CEQA Document at 1-1 (describing project objectives as obtaining an incidental take permit for longfin smelt).

NRDC-13

5. Because the Draft Longfin CEQA Document does not consider CVP operations, it does not provide CEQA compliance for DFG to issue a ITP to the Bureau of Reclamation

Because the Draft Longfin CEQA Document only purports to analyze environmental impacts of SWP operations on longfin smelt, and does not provide any description of, or analysis of impacts of, the operations of the Central Valley Project ("CVP"), the document fails to provide DFG with CEQA compliance for issuance of an incidental take permit for the CVP, or for coordinated operations of the CVP and SWP. See Cal. Code Regs., tit. 14, § 783.3. Because the CVP and SWP are jointly operated pursuant to a formal agreement, and because longfin smelt can be taken at the CVP pumps, we strongly recommend the document be revised to include an analysis of CVP operations and coordinated operations of the state and federal water projects.

NRDC-14

6. The Draft Longfin CEQA Document Only Analyzes Part of the Reasonable and Prudent Alternatives in the Delta Smelt Biological Opinion

In its description of the reasonable and prudent alternatives required in the delta smelt biological opinion, the Draft Longfin CEQA Document omits discussion or analysis of two of the required measures: restoration of 8,000 acres of subtidal and nearshore habitat, and operational restrictions to increase fall outflow in certain water year types. See, e.g., page 2-28 to 2-31. Because implementation of these measures by DWR is mandatory to obtain take authorization for delta smelt, the document should be revised to include a brief discussion of these measures and any potential benefits they may have for longfin smelt.

NRDC-15

7. The Comment Period Should be Extended So that the Public Can Comment on the CEQA Document with the Information Contained in the Application for an Incidental Take Permit Referenced in the CEQA Document

As noted above, the information contained in DWR's permit application is necessary for the public to understand the magnitude and extent of the proposed project and its environmental impacts. Unfortunately, however, such information is not included in the Draft Longfin CEQA Document. DWR submitted an incomplete permit application to DFG, and as of January 28,

NRDC-16

Ms. Heidi Rooks
February 2, 2009
Page 5

2008, DWR had not submitted a revised application to DFG, although such an application was expected next week. *See* email from Heidi Rooks, DWR to Doug Obegi dated January 28, 2008, attached hereto as Exhibit B. As a result, the time period for public comments will expire before the permit application is available to the public. The public comment period should be extended to permit the public to review a revised document that incorporates the permit application. In addition, we note that a longer time period may also be required because the document was submitted to the State Clearinghouse and because it concerns a project of regional and statewide importance. *See, e.g.*, Pub. Res. Code § 21091(b); CEQA Guidelines §§ 15073(a), (b). Because the Fish and Game Commission is not expected to act on the listing petition until its March 2009 commission meeting, a short extension of the comment period should not disrupt the regulatory process. Therefore, we request an extension of the public comment period to be able to consider and comment on the Draft Longfin CEQA Document with the necessary information in the revised permit application.

NRDC-16
continued

Thank you for consideration of our view. Please contact us at your convenience if you have any questions or comments.

Sincerely,



Doug Obegi
Staff Attorney

Enclosures:

- Exhibit A: Declaration of Perry Herrgesell, Department of Fish and Game, dated January 13, 2009
- Exhibit B: Email from Heidi Rooks, DWR to Doug Obegi dated January 28, 2008

NRDC-17

NRDC-18

RESPONSES TO NATURAL RESOURCES DEFENSE COUNCIL COMMENTS ON THE INITIAL STUDY/ DRAFT NEGATIVE DECLARATION

NRDC-1: The proposed project includes development of revised SWP operations for the permit application by DWR and the issuance by DFG of a permit for the take of longfin smelt, currently a candidate for listing under CESA, and possibly a listed species depending on action taken by the Fish & Game Commission in March 2009. Specifically, The Initial Study - Draft Negative Declaration (Draft IS/ND, January 2009) states: "The proposed project, or action, is the Department of Water Resources' (DWR) on-going and long-term operation of the State Water Project (SWP) in the manner consistent with the protection and conservation of the longfin smelt (*Spirincus thaleichthys*) in compliance with the California Endangered Species Act (CESA) as authorized by the California Department of Fish and Game (DFG) through issuance of a permit for take of longfin smelt under Section 2081 of CESA (California Fish and Game Code Section 2081)."

As described in the Draft ND, DWR has proposed actions for its long-term operations that will protect long-fin smelt and that are expected to be within the range of actions DWR must take to protect delta smelt under existing requirements. When DFG issues an incidental take permit to DWR for SWP operations, it will proscribe terms and conditions for operation of the SWP so as to minimize and mitigate the take of longfin smelt. These terms and conditions will ensure that DWR's actions will not cause a significant impact to longfin smelt. DWR believes that the Initial Study shows that there is no substantial evidence that the issuance of the permit may have a significant effect on the longfin smelt or the environment. NRDC does not make a fair argument that issuance of the incidental take permit may have a significant effect on the environment.

NRDC-2: DWR complied with CEQA and obtained authorization from the State Clearinghouse to have a 20-day public review period for the Draft ND. The Department of Fish and Game, Department of Boating and Waterways, Department of Public Health, Delta Protection Commission, and the State Lands Commission affirmed that they did not object to the shortened review time. DWR has described in the Draft IS/ND, including the appendices, the proposed project and provided an analysis of the project. The application is based on the contents of the Draft IS/ND. It is the Draft IS/ND that provides the information the public needs for commenting on the proposed project, not the application. Therefore, NRDC has sufficient information to make informed comments to DWR. DWR is not required to extend the comment period and has determined it is not necessary in this case. Furthermore, although it is unnecessary to attach the permit application as part of the Draft ND, DWR has made copies of its draft permit application available upon request. (See also response to comment of **NRDC-10 through 12.**)

NRDC-3: This comment is not related to the adequacy of the environmental analysis in the Draft IS/ND under CEQA, but to the adequacy of a take permit under CESA that will include measures necessary to protect longfin smelt. The Draft IS/ND adequately considers the environmental effects of the project – in this case, proposed operation of the SWP to protect longfin smelt and the issuance by DFG of a permit for the incidental take of longfin smelt by the SWP. The proposed project considers the on-going and long-term operations of the SWP in the manner consistent with the protection and conservation of the longfin smelt. DFG, in their comments, acknowledge that additional protective measures may be required. (See ATTACHMENT 4, **Memo from Chuck Armor to Barbara McDonnell re: comments on Longfin Smelt CEQA Document (dated 2/2/09).**) However, at the time the ND was prepared those measures were unknown and so could not have been analyzed. Because these measures, if any, will be proscribed through the permit, upon issuance of the permit DFG will consider whether additional CEQA compliance will be needed.

NRDC-4: The proposed project is not the implementation of the RPA from the December 2008 Fish and Wildlife Service Biological Opinion. It is based upon the same basic weekly protocol to make operational decisions, but would be triggered by data indicative of the vulnerability of Longfin smelt. While it appears that the timing of measures to protect delta smelt will be protective for longfin under many circumstances, DWR realizes that based upon real-time experience, protection of longfin may require the triggering of actions and the termination of actions at slightly different weeks.

NRDC-5: Again, as stated in DWR's response to NRDC-3, NRDC's comment relating to the adequacy of protections for longfin proposed either by DWR or DFG should be addressed to the adequacy of the 2081 permit. DFG, in their comments, acknowledge that additional protective measures may be required. (See ATTACHMENT 4.) However, at the time the ND was prepared those measures were unknown and so could not have been analyzed. Because these measures, if any, will be proscribed through the permit, upon issuance of the permit DFG will consider whether additional CEQA compliance will be needed. DWR detailed analysis concluded that the measures as defined in the IS/ND are protective of Longfin smelt as evaluated under CEQA evaluation criteria.

NRDC-6: DWR disagrees with the conclusion that its effects analysis, which is approximately 200 pages long, fails to provide "any meaningful analysis." DWR believes that the record speaks for itself on this issue. Although NRDC may disagree with some of DWR's conclusions, that does not mean that DWR failed to analyze the matter at issue. Many of the details that NRDC appears to seek will be addressed by DWR in the final Negative Declaration and possibly by DFG in the incidental take permit. As lead agency, DWR will complete its CEQA document and approve the proposed action to seek a take permit as part of the complete application to DFG. DWR's CEQA review precedes its approval of its proposed project, and DFG requires proof of compliance with CEQA prior to issuance of an Incidental Take Permit. (See

ATTACHMENT 4.) As part of completing the IS/ND, DWR does not find that the additional details provided in the final IS/ND substantially change the proposed project. This added information provides clarification or amplifies the analysis included in the Draft IS/ND, and does not create new significant environmental effects. If the DFG permit includes additional details or information, DFG will determine if the information merely clarifies the information already included in the final IS/ND or if additional CEQA analysis is required.

NRDC-7: DWR does not believe that there are significant deficiencies with the analysis of salvage of longfin smelt in the SWP, relative abundance of longfin smelt, and the relationship between salvage and abundance.

The IS/ND describes measures DWR considers adequate to reduce entrainment levels that are already very low. Since 1993, DFG estimates 1.5 million longfin smelt were entrained by SWP and CVP (CDFG 2009¹). More than 79 percent of that estimate were entrained in 2002. The estimated annual entrainment, using DFG estimates, was about 1,800 longfin smelt.

The IS/ND clearly recognizes the relationship between Delta outflow and longfin smelt abundance as reported by Herbold *et al.* 2005.

DFG may require additional protective measures addressing entrainment of longfin smelt, as stated in their comments on this ND. (See ATTACHMENT 4.) Additional protective measures by DFG, if required, may call for independent environmental documentation. At this time, however, not knowing what those terms and conditions might be, DWR can not meaningfully evaluate the environmental impacts of activities of which it is unaware.

NRDC-8: See DWR's response to NRDC-7

NRDC-9: The IS/ND describes measures DWR considers adequate to protect longfin smelt as required by CEQA. DFG may require additional protective measures for longfin smelt, as stated in their comments on this IS/ND to comply with CESA. (See ATTACHMENT 4.) Additional protective measures by DFG, if required, may call for independent environmental documentation. At this time, however, not knowing what those terms and conditions might be, DWR can not meaningfully evaluate the environmental impacts of activities of which it is unaware

NRDC-10 through 12: DWR has described in the Draft IS/ND, including the appendices, the proposed project and the analysis of the project. The application is based on the contents of the Draft IS/ND. It is the Draft IS/ND that provides the information the public needs for commenting on the proposed project, not the

¹ California Department of Fish and Game (CDFG). 2009. A Status Review of the Longfin Smelt (*Spirinchus thaleichthys*) in California. Report to the Fish and Game Commission. January 23, 2009.

application. Therefore, NRDC has sufficient information to make informed comments to DWR. Although it is unnecessary to attach the permit application as part of the Draft IS/ND, DWR has made copies of its draft permit application available upon request. Upon completion of the IS/ND, DWR will finalize the permit application. DFG will base their 2081 permit upon this record and all other relevant information available to them.

NRDC-13: DWR and DFG conferred on the question of lead agency status, and agreed that DWR should be CEQA lead agency on this proposed project. For purposes of applying for the take permit, DWR was required to identify SWP project operations that it would take to protect longfin smelt as a listed species. DWR's project description provides this information upon which DFG will make a determination, as a responsible agency, as to whether the described actions satisfy requirements of CESA or require additional conditions, to allow issuance of the take permit. Although DFG must take an action to issue the incidental take permit, DWR must take actions to protect longfin smelt. In this case, both agencies have a substantial claim to being a lead agency. CEQA Guidelines allow that where two or more public agencies may be the lead agency, the public agencies may by agreement designate one as the lead agency (14 CCR § 15051).

NRDC-14: The federal government, U.S. Bureau of Reclamation, that operates the CVP, is not seeking authority for take of longfin smelt under CESA. DFG will not be providing a take permit to Reclamation for CVP operation impacts on longfin smelt. Therefore neither DWR nor DFG require CEQA analysis of CVP operations. DFG will issue a take permit based on the SWP operations and impacts of those operations on longfin smelt, which is the analysis provided in the Draft ND. The measures prescribed in the take permit will be the responsibility of DWR. It will be DWR's responsibility to coordinate with Reclamation to the extent that such measures implicate coordinated operations with of the CVP.

NRDC-15: The proposed project is not the RPA in the Fish and Wildlife Service Biological Opinion. The proposed project is a stand alone commitment by DWR to operate the project in a manner to minimize effects on longfin smelt. In order to provide a rational approach to operating the SWP, and due to the fact that there are more similarities in the ways that the SWP effects longfin smelt and delta smelt than there are differences, DWR has proposed to use the basic weekly decision making protocol for the protection of longfin as is written into the FWS BO for delta smelt. It allows for one weekly set of operational data analysis and decision making meetings that allows DFG to input their requirements for longfin and delta smelt in a coordinated fashion. DWR does not consider other aspects of the RPA to be necessary for the protection of longfin smelt beyond the weekly operational requirements from December through June.

NRDC-16: NRDC states that "the time for public comments will expire before the permit application is available to the public. The public comment period should be extended to permit the public to review a revised document that incorporates the permit

application. . . . and that a longer timer period may also be required because it concerns a project of regional and statewide importance.” NRDC suggests that a “short extension of the comment period should not disrupt the regulatory process.”

See response to NRDC-2. DWR provided to NRDC a copy of the draft permit application. The short extension would significantly disrupt the regulatory process. DWR is authorized to take longfin smelt pursuant to emergency regulations that will expire on February 23, 2009. The emergency regulation can not be readopted. Therefore, DWR must obtain an incidental take permit from DFG for continued operation of the SWP beyond February 23. DWR’s application has requested a take permit of SWP operations for effects on longfin smelt that applies to either longfin as candidate or listed species. Any delay in the administrative process for obtaining take coverage could have significant impacts to the delivery of SWP water from the Delta. This could be of considerable impact given the current drought conditions in California.

Attachment 3

State Water Contractors Comments

San Luis & Delta-Mendota Water Authority



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Los Banos, CA 93635
Phone: 209/826-7866
Fax: 209/826-9698

State Water Contractors



State Water Contractors
1121 L Street, Suite 1050
Sacramento, CA 95814

February 2, 2009

VIA EMAIL AND FACSIMILE

hrooks@water.ca.gov
(916) 376-9688

Ms. Heidi Rooks
California Department of Water Resources
P.O. Box 942836
Sacramento, CA 94236

**Re: Longfin Smelt Initial Study/Draft Negative Declaration
(SCH #2009012022)**

Dear Ms. Rooks:

Thank you for providing the State Water Contractors ("SWC") and the San Luis & Delta-Mendota Water Authority ("Authority") with the opportunity to review and comment on the Initial Study/Negative Declaration ("Negative Declaration") prepared by the Department of Water Resources ("DWR") for the "On-going California State Water Project Operations in the Sacramento-San Joaquin Delta for the Protection of Longfin Smelt" (the "Project"). The SWC and the Authority believe, based on the January 23, 2009 DFG "Report To The Fish And Game Commission A Status Review Of The Longfin Smelt (*Spirinchus thaleichthys*) In California", there is a high probability that the Longfin smelt will be listed under the State Endangered Species Act. Because the California Department of Fish and Game ("DFG") has taken the position that the California Endangered Species Act extends to DWR, the SWC and the Authority understand the reasons for DWR's efforts to obtain an incidental take permit from DFG for operation of the State Water Project ("SWP").¹ The SWC and the Authority,

¹ Notwithstanding the role of the United States Fish and Wildlife Service, the final Negative Declaration must state in unambiguous terms that the California Endangered Species Act does not extend to the United States and the Bureau of Reclamation's Central Valley Project ("CVP"). Furthermore, nothing in this letter should be construed as a waiver of the position of the Kern County Water Agency or the Authority that the take prohibition in the California Endangered Species Act does not extend to state agencies or federal agencies, including to DWR's

{00151176; 1}RV/PUB/ZKATOR/758273.3

however, are concerned the Negative Declaration may be inadequate to satisfy the California Environmental Quality Act ("CEQA") (Public Resources Code section 21000 *et seq.* and California Code of Regulations, title 14, section 15000 *et seq.* ["CEQA Guidelines"]). The SWC and the Authority present the following comments to ensure the final document is based on good science, meets legal requirements, and ultimately allows DWR to continue to operate the SWP in a manner that allows the incidental take of longfin smelt. The SWC and the Authority welcome the opportunity to work with DWR to address the comments raised in this letter.

I. Notice Of The Public Comment Period

CEQA's procedural requirements are to be "scrupulously followed," and failure to comply with such requirements constitutes *per se* prejudicial error. (*Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 392; *see also Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564 (courts demand strict compliance with CEQA procedures).)

According to the Notice of Intent to Adopt a Negative Declaration, "[t]he public comment period will extend from January 13, 2009 through February 2, 2009." The State Clearinghouse website confirms this review period. Thus, the public comment period was limited to 20 days. Under CEQA Guidelines section 15073, subdivision (a), when a proposed negative declaration and initial study are subject to review by state agencies, the public review period must be at least 30 days, unless those reviewing agencies concur on a shorter period and the State Clearinghouse approves a written request for the shorter period. (CEQA Guidelines, § 15105, subd. (d)(3); *see id.*, App. K (criteria for shortened review).) The document should describe whether reviewing agencies such as the California Department of Fish and Game, State Water Resources Control Board, or State Lands Commission concurred in this shortened review period, as CEQA requires. (*Ibid.*; *see also* CEQA Guidelines, § 15073, subd. (a).)

Furthermore, shortened review periods are not appropriate for "any project which is of statewide, regional, or area wide significance," as defined in CEQA Guidelines section 15206. (CEQA Guidelines, § 15105, subd. (d)(1); *id.*, App. K.) Under section 15206, a Project that involves the take of special status species is ineligible for shortened review. (CEQA Guidelines, § 15206, subd. (b)(5).) The "Notice of Intent to Adopt a Negative Declaration" may thus be inadequate because it does not state that the notice period has been shortened from 30 days to 20 days, or justify shortening the period. (CEQA Guidelines, § 15072, subd. (g)(2).)

operation of the SWP, and Reclamation's operation of the CVP. These agencies see the need for DWR's efforts to obtain take authority because DFG has taken the position that the take prohibition does apply, hence placing SWP operators and its employees under the threat of potential civil or criminal enforcement for take of longfin smelt. In pending litigation, these agencies are seeking declaratory and injunction relief to clarify this legal issue and to prevent DFG from pursuing such unlawful enforcement actions.

{00151176; 1}

SWC-1

II. Project Description

Under CEQA, a "project" includes "the whole of the action." (CEQA Guidelines, § 15376.) CEQA requires a clear and sufficiently comprehensive description of the proposed project to allow meaningful public and agency review.² (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193; see also *Christward Ministry v. Superior Court* (1986) 184 Cal.App.3d 180, 196-197.) In other words, the project description must not omit integral components of the project. Under these requirements, the document's Project description may not comport with CEQA. The Negative Declaration's description of methodology should more clearly explain how the scope of analysis was determined. The Negative Declaration asserts, for example, that the proposed Project involves no additional actions for the protection of longfin smelt beyond actions already in place for protection of delta smelt. These defects might be avoided if the duration of the proposed Project is shortened to less than 1 year (i.e., through November 2009).

SWC-2

III. Baseline Of Environmental Conditions

To determine whether a proposed action may cause significant environmental effects, the lead agency must identify the physical conditions against which to compare a project's anticipated impacts. The CEQA Guidelines establish a general rule that existing environmental conditions at the time review is commenced "normally" constitute the baseline. (CEQA Guidelines, § 15125, subd. (a); see Pub. Resources Code, § 21060.5; *Galante Vineyards v. Monterey Peninsula Water Management District* (1997) 60 Cal.App.4th 1109, 1122.) Courts interpreting baseline issues have held, however, that agencies must approach the identification of baseline conditions differently in different types of situations. In situations involving water supply, for example, where water used or released varies year to year or otherwise over time, the baseline must account for changing conditions to allow for a proper understating of potential environmental impacts. (See, e.g., *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 119, 124; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 955.) The Negative Declaration appears to provide insufficient information as to the baseline environmental condition used in the analysis or how it was determined. For example, the Negative Declaration should disclose that the United States Fish and Wildlife Service biological opinion on the coordinated operation of the Central Valley Project and State Water Project has been in effect only since mid-December 2008 and include a discussion of environmental conditions in prior years.

SWC-3

² The Negative Declaration fails to explain how the proposed Project supports the project objectives – the issuance of an incidental take permit pursuant to section 2081 of the California Fish and Game Code. In fact, based upon the best scientific and other information that is reasonably available, the SWC and the Authority do not believe the proposed Project is roughly proportional to the SWP impacts or is consistent with the objectives of the SWP, to the greatest extent possible. The proposed Project would alter SWP operations far in excess of that needed to allow DFG to issue a permit to DWR.

{00151176;1}

IV. Significant Direct, Indirect And Cumulative Environmental Impacts.

CEQA requires the lead agency to analyze a project's direct and reasonably foreseeable indirect environmental impacts. (Pub. Resources Code, § 21065; CEQA Guidelines, § 15378 subd. (a).) Implementation of proposed Project activities may potentially result in adverse water supply impacts by reducing water available to millions of Californians and millions of acres of prime farm land. (See *Santiago Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 830-832 (environmental document must assess impacts of delivering a large quantity of water to mining project on water supply elsewhere in the area); *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2003) 106 Cal.App.4th 715, 720-724 (lead agency must analyze project's potential to cause water shortage and disclose impacts associated with uncertain supplies of SWP water); *California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219, 1237 (CEQA requires full disclosure of water supply vulnerabilities and effects of that vulnerability on supply reliability must be evaluated).)

Reduced water supplies are likely to cause a host of foreseeable indirect environmental impacts, including, but not limited to impacts to aesthetics, agriculture, air quality, biological resources, geology and soils, hazards, hydrology and water quality, land use and planning, population and housing, and public services and utilities. These include impacts to (1) agriculture from abandoned and fallowed agricultural fields, (2) air quality from the increased dust and particulate matter from those fields, as well as a lack of water to minimize fugitive dust emissions from existing land uses including to agricultural lands, construction projects, and similar activities, (3) biological resources from the lack of water for use for wetlands and listed species outside the Delta, (4) geology and soils from the use of lower quality and higher salinity water and loss of topsoil, (5) hazards due to land subsidence from increased pumping of groundwater and lack of water for wildfires, (5) hydrology and water quality due to lack of imported water for replenishment, and (6) land use from the curtailment of drinking water supplies throughout California, among others.

The Negative Declaration should address these substantial environmental concerns, adequately disclose the Project's direct and reasonably foreseeable indirect environmental effects, and provide sufficient support for the conclusions reached therein. It is insufficient to merely acknowledge that the effect of the proposed actions is unknown and the performance standards against which they will be evaluated also are unknown. (See, e.g., Negative Declaration, pp. 2-31, 2-37.) CEQA does not permit deferral of analysis and mitigation in the absence of identified, enforceable performance standards. (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 309; *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1396.) The conclusion that the Project's incremental impacts, in combination with past, present, and reasonably foreseeable future projects, are not cumulatively considerable seems to be unsupported. (CEQA Guidelines, § 15064(h).)

SWC-4

{00151176; 1}

Heidi Rooks
California Department of Water Resources
February 2, 2009
Page 5

Finally, the Negative Declaration should be more complete and internally consistent, and clearly present Project information, thereby complying with CEQA's information disclosure provisions. (Pub. Resources Code, 21005, subd. (a); *Citizens for Responsible and Open Government v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323, 1341 (the CEQA process demands that environmental information be complete and relevant).)


SWC-5

Again, we would like to thank you for the opportunity to submit these comments. Please ensure that copies of all notices concerning the proposed Project are sent to us at the above addresses.

Very truly yours,



Daniel G. Nelson
Executive Director
San Luis & Delta-Mendota Water Authority



Terry L. Erlewine
General Manager
State Water Contractors

{00151176; 1}

RESPONSES TO STATE WATER CONTRACTORS COMMENTS ON THE INITIAL STUDY/ NEGATIVE DECLARATION

SWC-1: CEQA guidelines state that the State Clearinghouse may approve a shortened public review period of not less than 20 days for a proposed negative declaration. (14 CCR § 15105(b)) This 20 day public review may be granted where the project is not of statewide, area wide, or regional environmental significance, where the Lead Agency has requested shortened review in writing, and where responsible and trustee agencies have been contacted by the lead agency, and they agree to the shortened review period, and in accordance with the provisions of Appendix K CEQA Guidelines. (14 CCR § 15105(d))

DWR applied in writing to the State Clearinghouse for shortened review and provided information to demonstrate compliance with CEQA guidelines. The State Clearinghouse determined that the proposed project is not of statewide, area wide, or regional environmental significance based on information provided in DWR's request for shortened review. This information described the proposed project as DWR's ongoing and long-term operation of the SWP in the manner consistent with the protection and conservation of the longfin smelt in compliance with CESA through issuance of a permit for take of an otherwise lawful activity. DWR noted that the approval of the proposed project would not have statewide, regional, or area wide significance because the project will result in DWR obtaining take authorization for a newly listed fish under CESA and will enable DWR to continue existing water delivery operations. As described, DWR's proposed project would not significantly change current activities and therefore would not have potential to cause significant effects to the surrounding environment.

DWR contacted other responsible and trustee agencies seeking their concurrence in the shortened review time. DWR contacted DFG early in the process and advised them that DWR would seek expedited review. DFG provided a memo to DWR, which DWR forwarded to the State Clearinghouse, stating it did not object to the shortened review time. DFG is the only responsible/trustee agency that will take an action on this project. DWR will remain in compliance with all other permits. DWR also contacted the Department of Boating and Waterways, the Central Valley Flood Protection Board, the Regional Water Quality Control Board (Central Valley Region), the Department of Public Health, the State Lands Commission, the State Water Resources Control Board, and the Delta Protection Commission. Of these Boating and Waterways, Department of Public Health, Delta Protection Commission and State Lands Commission responded stating they were not opposed to the expedited review. The State Water Resources Control Board referred our query to the Board's Division of Water Rights, but that Division did not pursue the matter further. The other agencies did not respond to our inquiry. The State Clearinghouse formally approved DWR's request for shortened review.

ATTACHMENT 5: E-Mail from DFG regarding shortened review.

ATTACHMENT 6: DWR Request for Shortened Review.

ATTACHMENT 7: State Clearinghouse approval of shortened review.

CEQA Regulations state that a proposed project is of statewide, regional, or area wide significance if the project meets certain criteria. (14 CCR § 15206(b)) Among these is any project that “would substantially affect sensitive wildlife habitats . . . and habitats for endangered, rare and threatened species . . .” (14 CCR § 15206(b)(5)) The project here would allow for continued operations of the SWP through issuance of a “take” permit for a listed species and would not substantially change or affect existing habitat, and so does not come under this exclusion.

The Notice of Intent filed by DWR on January 13, and Notice of Completion, identified a shortened public review period, as indicated by the beginning and end dates of the period in the document (January 13, 2009 through February 2, 2009).

ATTACHMENT 8: Copies of the Notice of Completion and Notice of Intent

SWC-2: This comment misapprehends the nature of the project. The project is not to construct the SWP, but simply to obtain take authority pursuant to CESA to continue to operate the SWP once emergency regulations authorizing the take of longfin smelt during its candidacy period have lapsed (February 23, 2009), and in the event that longfin smelt is listed by the Fish and Game Commission as a threatened or endangered species.

SWC-3: DWR has included a complete project description of the proposed project in the Initial Study and Draft Negative Declaration. DWR has described SWP operations that it believes adequately protect longfin smelt. These actions will be taken to protect longfin smelt. DWR does not agree that additional actions need to be included in the proposed project. Therefore the whole of the project is described in the document. It is possible that DFG, as the agency responsible for administering the California Endangered Species Act, might impose additional terms and conditions beyond those described. DFG will determine whether any such conditions would require independent environmental analysis. DWR does not believe that shortening the time period of the proposed project effects the issue of whether DWR has provided a complete project description.

SWC-4: DWR has analyzed in the Initial Study and Draft Negative Declaration the SWP operations that it believes will protect longfin smelt as required by CEQA. The analysis shows that no significant changes in SWP operations would occur in providing such protection and therefore no significant effects to the environment would occur, whether direct or indirect, from the proposed project. The cases cited by the SWC (*Save our Peninsula Committee v. Monterey County Board of Supervisors*, 87 Cal.App.4th 99, 104 Cal.Rptr.2d 326 (Cal.App. 6 Dist.,2001) and *County of Amador v. El Dorado County Water Agency*, 76 Cal.App.4th 931, 91 Cal.Rptr.2d 66 (Cal.App. 3 Dist.,1999)) involve water projects and the failure to consider water supply uncertainties as part of a CEQA review. Those cases address environmental analysis of development projects and whether the analysis adequately examines availability of water supplies and the precariousness of those supplies. That is not the issue here. This project, in contrast, is not a water supply

project but an effort to obtain take authority from DFG for a newly listed species so that DWR may operate the SWP in compliance with CESA. Lacking that authority, DWR may be forced to cease SWP operations, which *would* have significant water supply impacts. DWR believes that the range of existing operating requirements needed for protection of delta smelt create conditions within which DFG may determine that longfin smelt populations are reasonably protected from SWP operations. As shown by the analysis provided in the draft IS/ND, DWR's operations that address protection of longfin smelt will not require significant changes to SWP operations and therefore would not have significant effects to water supply. As proposed, longfin protections would be triggered by data specific to longfin population biology. Because this data cannot be projected in advance, it is not possible to state when protections for longfin might be more restrictive than for Delta smelt. DWR intends to use any flexibility within the system to reduce water supply impacts. Our experience to date suggests that Delta smelt criteria will be equally or more restrictive for most of the December through June time period.

Attachment 4

California Department of Fish and Game Comments

State of California

Department of Fish and Game

Memorandum

Date : February 2, 2009

To : Barbara McDonnell, Chief
Department of Water Resources - Division of Environmental Services

From : Chuck Armor, Regional Manager
Department of Fish and Game – Bay Delta Region 

Subject : Comments on Longfin Smelt California Environmental Quality Act (CEQA) Document

The Department of Fish and Game (DFG) has reviewed the draft Negative Declaration (ND) prepared by the Department of Water Resources (DWR) for the ongoing operations of the California State Water Project (SWP) in the Sacramento-San Joaquin Delta for protection of longfin smelt (*Spirinchus thaleichthys*). DFG will act as a responsible agency under CEQA for this project since it has been asked to approve an Incidental Take Permit (ITP) for take of longfin smelt related to SWP operations. DWR submitted the ITP application pursuant to California Endangered Species Act (CESA) section 2081(b) of the California Fish and Game Code and California Code of Regulations (CCR), title 14, section 783.2.

The Project Description in the ND includes some of the measures from the U.S. Fish and Wildlife Service's Biological Opinion for delta smelt issued to the Bureau of Reclamation for the coordinated operations of the Central Valley Project and SWP as measures for impacts to longfin smelt from SWP operations. Though some of the measures may be protective of longfin smelt, DFG may require additional protective measures specific to the species to meet the standards for issuance of ITPs under CESA. CESA provides in pertinent part:

- (b) The department may authorize, by permit, the take of endangered species, threatened species, and candidate species if all of the following conditions are met:
 - (1) The take is incidental to an otherwise lawful activity.
 - (2) The impacts of the authorized take shall be minimized and fully mitigated. The measures required to meet this obligation shall be roughly proportional in extent to the impact of the authorized taking on the species. Where various measures are available to meet this obligation, the measures required shall maintain the applicant's objectives to the greatest extent possible. All required measures shall be capable of successful implementation. For purposes of this section only, impacts of taking include all impacts on the species that result from any act that would cause the proposed taking.
 - (3) The permit is consistent with any regulations adopted pursuant to Sections 2112 and 2114.
 - (4) The applicant shall ensure adequate funding to implement the measures required by paragraph (2), and for monitoring compliance with, and effectiveness of, those measures.
- (c) No permit may be issued pursuant to subdivision (b) if issuance of the permit would jeopardize the continued existence of the species. The department shall make this determination based on the best scientific and other information that is reasonably

available, and shall include consideration of the species' capability to survive and reproduce, and any adverse impacts of the taking on those abilities in light of (1) known population trends; (2) known threats to the species; and (3) reasonably foreseeable impacts on the species from other related projects and activities.

DFG, in consultation with DWR, will continue to review the analysis in the ND to determine appropriate measures for the ITP to meet all applicable CESA standards.

As noted in previous correspondence, compliance with CEQA is required prior to ITP issuance pursuant to CCR section 783.3. While DFG continues to develop a draft ITP, a Notice of Determination and proof of payment of CEQA filing fees is needed before the draft ITP can be finalized.

DFG looks forward to continuing to work with DWR on its CESA compliance for longfin smelt. If you have any questions regarding these comments or to arrange for other discussions, please contact Scott Wilson, Environmental Program Manager, at the address provided on the letterhead or by telephone at (707) 944-5584.

cc: Department of Fish and Game
Chandra Ferrari, Office of General Counsel, Sacramento
Scott Wilson, Bay Delta Region

Attachment 5

E-Mail from California Department of Fish and Game regarding Shortened Review

State of California

The Resources Agency

M e m o r a n d u m

Date: December 31, 2008

To: Barbara McDonnell, Chief
Division of Environmental Services
Department of Water Resources
1416 Ninth Street
Sacramento, CA 95814

From: Chuck Armor, Regional Manager 
California Department of Fish and Game
Bay Delta Region
Post Office Box 47
Yountville, CA 94599

Subject: Department of Water Resources (DWR) Request for Shortened Comment Period for California Environmental Quality Act (CEQA) Document for Longfin Smelt Incidental Take Permit

The Department of Fish and Game (DFG) was informed that DWR will request from the State Clearinghouse a shortened review period for the CEQA document developed for the longfin smelt incidental take permit. DFG does not believe that a shortened review period will impact its ability to review the document in its capacity as responsible or trustee agency, and therefore does not oppose the request.

If you have any questions, please do not hesitate to contact Scott Wilson, Environmental Program Manager, at (707) 944-5584.

cc: Department of Fish and Game
Chandra Ferrari, Office of General Counsel, Sacramento
Scott Wilson, Bay Delta Region

Attachment 6

Department of Water Resource Request for Shortened Review

FEB-17-2009 12:33

STATE CLEARINGHOUSE

P.002

Shortened Review Request Form

Form E

(To be filled out and signed by the Lead Agency and Submitted with DEIR or Negative Declaration to SCH)

To: State Clearinghouse
P. O. Box 3044
Sacramento, CA 95812-3044

From: California Department of Water Resources (DWR)

Lead Agency:

1416 Ninth Street (P.O. Box 942836)

Address:

Sacramento, CA 94236-0001

Phone#: (916) 376-9700

Contact: Barbara McDonnell, Chief DES

2009012022

RECEIVED

JAN 06 2009

SCH # STATE CLEARINGHOUSE

Project Title: DWR proposed actions that mitigate effects of the take of longfin smelt due to State Water Project operations in the Delta that will enable DWR to obtain DFG "take" authorization under the California Endangered Species Act section 2081

Project Location: Sacramento-San Joaquin Delta, Alameda and Santa Clara Counties

City

County

Explain "exceptional circumstances" (CEQA, Section 15205(d)) for requesting a shortened review:

DWR requests a shortened review period of 20 days of its Draft Initial Study / Negative Declaration so that DWR can receive all comments and prepare a final document before February 23 when the Fish and Game Commission emergency regulations authorizing SWP take of longfin smelt expire. Exceptional circumstances exist requiring the shortened review time because DWR was unable to begin preparation of the draft IS/ND prior to December 15, 2008 and DWR needs the project to be completed by February 23, 2009 in order to continue take authorization of longfin smelt to allow delivery of water from the delta. On December 15, the USFWS issued its delta smelt biological opinion for DWR SWP operations. The FWS Opinion includes essential information for DWR's proposed project, including the description of delta operations and actions to protect longfin smelt. If DWR does not have the shortened review time, DWR may not obtain the necessary take permit from DFG prior to expiration of the existing take authorization. This could cause DWR to cease SWP delta operations due to unauthorized take of a listed species. Thus, the expeditious approval of the proposed project and issuance of the CESA take permit is needed to avoid cessation of SWP delta operations which would put the health and safety of water users in the bay area at risk. DWR delivers water to its SWP customers to the Santa Clara Valley Water District, the Alameda County Flood Control & Water Conservation District, Zone 7, and the Alameda County Water District via its South Bay Aqueduct. These customers have limited alternative sources of water and the lack of SWP supplies could put fire department operations in jeopardy (See attached declaration paragraph 19). This circumstance satisfies the criteria for a shortened review time under CEQA Guideline Appendix K, item 4.

The approval of this project will not have statewide, regional, or area wide significance because the project does not have potential for causing significant effects to the surrounding environment. The approval of the project will result in DWR obtaining take authorization for a newly listed fish under CESA, the longfin smelt, and will enable DWR to continue existing water delivery operations.

List responsible and trustee state agencies, as well as any agencies that have commented on the project (indicate whether the Responsible and Trustee Agencies have granted approval for this shortened review):

California Department of Fish and Game
Chuck Armor, Region 3 Manager writes on behalf of

FEB-17-2009 12:34

STATE CLEARINGHOUSE

P.003

DLG on December 31, 2008 that that Department did
not object to the request for expedited review (copy
attached)

As designated representative for the lead agency, I verify, in their behalf, that there is no "statewide, regional, or
areawide significance" to this project.

Length of review being requested: 20 days

1/6/09

Today's Date

Barbara McDonnell

Print Name

Barbara McDonnell

Signature

Attachment 7

State Clearinghouse Approval of Shortened Review



ARNOLD SCHWARZENEGGER
GOVERNOR

STATE OF CALIFORNIA
GOVERNOR'S OFFICE *of* PLANNING AND RESEARCH
STATE CLEARINGHOUSE AND PLANNING UNIT



CYNTHIA BRYANT
DIRECTOR

January 15, 2009

Heidi Rooks
California Department of Water Resources
P.O. Box 942836
West Sacramento, CA 95691

RE: On-Going California State Water Project Operations in the Sacramento San
Joaquin Delta for the Protection of Longfin Smelt (Negative Declaration)

SCH#2009012022

Dear Ms. Rooks:

We have reviewed your shortened review request and have determined that it is consistent with the criteria set forth in the written guidelines of the Office of Planning and Research for shortened reviews, and Section 21091 of the Public Resources Code.

The shortened review period for a negative declaration shall not be less than 20 days. The review process for the referenced project will start on January 13, 2009 and end on February 2, 2009.

If you have any questions, please contact Seth Litchney at (916) 445-0613.

Sincerely,

Terry Roberts
Director

cc: file

1400 10th Street P.O. Box 3044 Sacramento, California 95812-3044
(916) 445-0613 FAX (916) 323-3018 www.opr.ca.gov

Attachment 8

Copies of the Notice of Completion and Notice of Intent

Appendix C

Notice of Completion & Environmental Document Transmittal

2009012022

Mail to: State Clearinghouse, P.O. Box 3044, Sacramento, CA 95812-3044 (916) 445-0613
For Hand Delivery/Street Address: 1400 Tenth Street, Sacramento, CA 95814

SCH #

Project Title: On-going California State Water Project Operations in the Sacramento-San Joaquin Delta for the Protection of Longfin Smelt

Lead Agency: California Department of Water Resources

Contact Person: Heidi Rooks

Mailing Address: P. O. Box 942836

Phone: (916) 376-9704

City: West Sacramento

Zip: 95691

County: Sacramento

Project Location: Contra Costa, Sacramento,
San Joaquin, Solano, Yolo

City/Nearest Community: Sacramento/Stockton

Cross Streets:

Zip Code:

Longitude/Latitude (degrees, minutes and seconds): ° ' " N / ° ' " W Total Acres:

Assessor's Parcel No.:

Section:

Twp.:

Range:

Base:

Within 2 Miles: State Hwy #:

Waterways: Sacramento-San Joaquin Delta

Airports:

Railways:

Schools:

Document Type:

CEQA: ☐ NOP ☐ Draft EIR ☐ Early Cons ☐ Neg Dec ☐ Mit Neg Dec

☐ Supplement/Subsequent EIR (Prior SCH No.) ☐ Other:

NEPA:

☐ NOI ☐ EA ☐ Draft EIS ☐ FONSI

Other:

☐ Joint Document ☐ Final Document ☒ Other: DWR Action

Local Action Type:

☐ General Plan Update ☐ General Plan Amendment ☐ General Plan Element ☐ Community Plan

☐ Specific Plan ☐ Master Plan ☐ Planned Unit Development ☐ Site Plan

☐ Rezone ☐ Use Permit ☐ Land Division (Subdivision, etc.)

☐ Annexation ☐ Redevelopment ☐ Coastal Permit ☐ Other:

Development Type:

☐ Residential: Units _____ Acres _____
☐ Office: Sq.ft. _____ Acres _____ Employees _____
☐ Commercial: Sq.ft. _____ Acres _____ Employees _____
☐ Industrial: Sq.ft. _____ Acres _____ Employees _____
☐ Educational: _____
☐ Recreational: _____
☐ Water Facilities: Type _____ MGD

☐ Transportation: Type _____
☐ Mining: Mineral _____
☐ Power: Type _____ MW
☐ Waste Treatment: Type _____ MGD
☐ Hazardous Waste: Type _____
☐ Other:

Project Issues Discussed in Document:

☒ Aesthetic/Visual ☒ Agricultural Land ☒ Air Quality ☒ Archeological/Historical ☒ Biological Resources ☐ Coastal Zone ☐ Drainage/Absorption ☐ Economic/Jobs

☐ Fiscal ☐ Flood Plain/Flooding ☐ Forest Land/Fire Hazard ☒ Geologic/Seismic ☒ Minerals ☒ Noise ☒ Population/Housing Balance ☒ Public Services/Facilities

☒ Recreation/Parks ☐ Schools/Universities ☐ Septic Systems ☐ Sewer Capacity ☒ Soil Erosion/Compaction/Grading ☐ Solid Waste ☒ Toxic/Hazardous ☒ Traffic/Circulation

☒ Vegetation ☒ Water Quality ☒ Water Supply/Groundwater ☐ Wetland/Riparian ☐ Growth Inducement ☒ Land Use ☒ Cumulative Effects ☐ Other:

Present Land Use/Zoning/General Plan Designation:

Various

Project Description: (please use a separate page if necessary)

Please see attached page.

Note: The State Clearinghouse will assign identification numbers for all new projects. If a SCH number already exists for a project (e.g. Notice of Preparation or previous draft document) please fill in.

Revised 2008

Project Description

The proposed project, or action, is the Department of Water Resources' (DWR) on-going and long-term operation of the State Water Project (SWP) in the manner consistent with the protection and conservation of the longfin smelt (*Spirincus thaleichthys*) in compliance with the California Endangered Species Act (CESA) as authorized by the California Department of Fish and Game (DFG) through issuance of a permit for take of longfin smelt under Section 2081 of CESA (California Fish and Game Code Section 2081). The action consists of operation of SWP facilities consistent with certain actions identified in the U.S. Fish and Wildlife Service Delta Smelt Biological Opinion of the Operating Criteria and Plan for the Coordinated Operations of the Central Valley Project and State Water Project (USFWS 2008). The action includes operation of SWP facilities from December through June to protect adult longfin smelt migration and spawning and larvae and juvenile rearing. The protection of longfin smelt is achieved through operations undertaken during the same period to protect delta smelt which are sufficient for the protection of longfin smelt because of adaptive management provisions and the substantial overlap in timing and distribution of these species in the Sacramento-San Joaquin Delta. The specific operations are described in detail in Chapter 2, Project Description (see section titled Proposed State Water Project Operations for Protection of Longfin Smelt) in the attached Initial Study (IS). Additional monitoring measures are described in Section 2.7 of the IS, Minimization Measures for SWP Operations.

Reviewing Agencies Checklist

Lead Agencies may recommend State Clearinghouse distribution by marking agencies below with an "X".
If you have already sent your document to the agency please denote that with an "S".

<input type="checkbox"/> Air Resources Board	<input type="checkbox"/> Office of Emergency Services
<input checked="" type="checkbox"/> Boating & Waterways, Department of	<input type="checkbox"/> Office of Historic Preservation
<input type="checkbox"/> California Highway Patrol	<input type="checkbox"/> Office of Public School Construction
<input type="checkbox"/> Caltrans District # _____	<input checked="" type="checkbox"/> Parks & Recreation, Department of
<input type="checkbox"/> Caltrans Division of Aeronautics	<input type="checkbox"/> Pesticide Regulation, Department of
<input type="checkbox"/> Caltrans Planning	<input type="checkbox"/> Public Utilities Commission
<input checked="" type="checkbox"/> Central Valley Flood Protection Board	<input checked="" type="checkbox"/> Regional WQCB # <u>2, 5</u>
<input type="checkbox"/> Coachella Valley Mtns. Conservancy	<input checked="" type="checkbox"/> Resources Agency
<input type="checkbox"/> Coastal Commission	<input checked="" type="checkbox"/> S.F. Bay Conservation & Development Comm.
<input type="checkbox"/> Colorado River Board	<input type="checkbox"/> San Gabriel & Lower L.A. Rivers & Mtns. Conservancy
<input type="checkbox"/> Conservation, Department of	<input type="checkbox"/> San Joaquin River Conservancy
<input type="checkbox"/> Corrections, Department of	<input type="checkbox"/> Santa Monica Mtns. Conservancy
<input checked="" type="checkbox"/> Delta Protection Commission	<input checked="" type="checkbox"/> State Lands Commission
<input type="checkbox"/> Education, Department of	<input type="checkbox"/> SWRCB: Clean Water Grants
<input type="checkbox"/> Energy Commission	<input checked="" type="checkbox"/> SWRCB: Water Quality
<input checked="" type="checkbox"/> Fish & Game Region # <u>2, 3</u>	<input checked="" type="checkbox"/> SWRCB: Water Rights
<input type="checkbox"/> Food & Agriculture, Department of	<input type="checkbox"/> Tahoe Regional Planning Agency
<input type="checkbox"/> Forestry and Fire Protection, Department of	<input type="checkbox"/> Toxic Substances Control, Department of
<input type="checkbox"/> General Services, Department of	<input type="checkbox"/> Water Resources, Department of
<input checked="" type="checkbox"/> Health Services, Department of	<input type="checkbox"/> Other: _____
<input type="checkbox"/> Housing & Community Development	<input type="checkbox"/> Other: _____
<input type="checkbox"/> Integrated Waste Management Board	
<input type="checkbox"/> Native American Heritage Commission	

Local Public Review Period (to be filled in by lead agency)

Starting Date January 13, 2009 Ending Date February 2, 2009

Lead Agency (Complete if applicable):

Consulting Firm: <u>HDR Engineering Inc.</u>	Applicant: _____
Address: <u>1610 Arden Way, Suite 175</u>	Address: _____
City/State/Zip: <u>Sacramento, CA 95815</u>	City/State/Zip: _____
Contact: <u>Amanda Ransom</u>	Phone: _____
Phone: <u>(916) 569-1077</u>	

Signature of Lead Agency Representative: Barbara McDonnell Date: 1/13/09

Authority cited: Section 21083, Public Resources Code. Reference: Section 21161, Public Resources Code.

Revised 2008



**Notice of Intent to Adopt a
Negative Declaration**

DATE: January 13, 2009

TO: Interested Parties

FROM: California Department of Water Resources

Re: A Negative Declaration for the On-going California State Water Project Operations in the Sacramento-San Joaquin Delta for the Protection of Longfin Smelt is available for public review beginning January 13, 2009.

Project Location and Description: The proposed project, or action, is the Department of Water Resources' (DWR) on-going and long-term operation of the State Water Project (SWP) in the manner consistent with the protection and conservation of the longfin smelt (*Spirincus thaleichthys*) in compliance with the California Endangered Species Act (CESA) as authorized by the California Department of Fish and Game (DFG) through issuance of a permit for take of longfin smelt under Section 2081 of CESA (California Fish and Game Code Section 2081). The action consists of operation of SWP facilities consistent with certain actions identified in the U.S. Fish and Wildlife Service Delta Smelt Biological Opinion of the Operating Criteria and Plan for the Coordinated Operations of the Central Valley Project and State Water Project (USFWS 2008). The action includes operation of SWP facilities from December through June to protect adult longfin smelt migration and spawning and larvae and juvenile rearing. The protection of longfin smelt is achieved through operations undertaken during the same period to protect delta smelt which are sufficient for the protection of longfin smelt because of adaptive management provisions and the substantial overlap in timing and distribution of these species in the Sacramento-San Joaquin Delta. The specific operations are described in detail in Chapter 2, Project Description (see section titled Proposed State Water Project Operations for Protection of Longfin Smelt) in the attached Initial Study (IS). Additional monitoring measures are described in Section 2.7 of the IS, Minimization Measures for SWP Operations.

Document Review and Availability: The public comment period will extend from **January 13, 2009 through February 2, 2009**. The Negative Declaration is available for public review at the following locations:

- ☐ Sacramento Public Library, 828 I Street, Sacramento, CA 95814
- ☐ Stockton-San Joaquin County Public Library - Cesar Chavez Central Library, 605 N. El Dorado Street, Stockton, CA 95202

Contact: Comments on the Initial Study/Draft Negative Declaration can be directed to:

Ms. Heidi Rooks
California Department of Water Resources
3500 Industrial Boulevard
West Sacramento, CA 95691

hrooks@water.ca.gov
phone: (916) 376-9704
fax: (916) 376-9688

Mailing address:
PO Box 942836
Sacramento, CA 94236

MODIFICATIONS TO DWR'S INITIAL STUDY/ DRAFT NEGATIVE DECLARATION FOR ON-GOING CALIFORNIA STATE WATER PROJECT OPERATIONS IN THE SACRAMENTO- SAN JOAQUIN DELTA FOR THE PROTECTION OF LONGFIN SMELT

The purpose of public review of the Department of Water Resources (DWR's) Initial Study/Draft Negative Declaration (IS/Draft ND) for on-going California State Water Project Operations in the Sacramento-San Joaquin Delta for the protection of longfin smelt was to receive comments from interested parties on its completeness and adequacy in disclosing potential environmental impacts of the proposed project. The information regarding revisions to the IS/Draft ND contained within this document comprises one component of the materials that comprise the IS/ Final ND, which has been prepared following the close of the IS/ Draft ND public review period on February 2, 2009. The IS/Final ND contains, among other items, the comments received on the IS/ Draft ND and responses to those comments, and clarifications or further explanations of information provided in the IS/Draft ND. DWR, as the lead agency for California Environmental Quality Act (CEQA) compliance purposes, is responsible for approving the IS/ND. After making this approval, DWR will use the IS/ND, along with other relevant information, in making its decision on whether to approve the proposed project.

Modifications to the Draft IS/ND

No modifications to the IS/Draft ND have been made, except for replacing Appendix 3 (Draft Longfin Smelt Effects Analysis) with the final version (**Attachment 9**).

Attachment 9

APPENDIX 3

LONGFIN SMELT EFFECTS ANALYSIS
